INDEX

CITATIONS

IN THE

Supreme Court of the United States

October Term, 1953

No. 19

THEATRE ENTERPRISES, INC., *Petitioner*

v.

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO PICTURES, INC. TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., UNITED ARTISTS CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., WARNER BROS. CIRCUIT MANAGEMENT CORP., COLUMBIA PICTURES CORPORATION, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONER

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit (R. 345-361) is reported at 201 F. 2d 306.

JURISDICTION

The Judgment of the Court of Appeals was entered on January 5, 1953 (R. 361). The petition for a writ of certi-

orari was filed March 9, 1953, and was granted on May 25, 1953. (SR. 93).[1] The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under the admitted or undisputed facts in this case, the District Court erred in refusing to direct a verdict for petitioner as a matter of law.

2. Whether the District Court erred in failing adequately to explain the background, scope and significance of the Paramount Case and its impact on the instant case, and in negativing the benefits of Section 5 of the Clayton Act by instructing the Jury that petitioner still had to prove conspiracy because the present factual situation had not been before the Court in the Paramount Case.

STATUTES INVOLVED

Petitioner brought suit under Sections 4 and 16 of the Clayton Act (38 Stat. 731; 15 U.S.C. Sec. 14, 26) for alleged violations of Sections 1 and 2 of the Sherman Act (38 Stat. 209; 15 U.S.C. Sec. 1 and 2). Section 5 of the Clayton Act (38 Stat. 731; 15 U.S.C. Sec. 16) enumerates the benefits afforded private plaintiffs from Government antitrust litigation. The pertinent provisions of these Statutes are set forth in the Appendix, *infra*, pp. 61-62.

STATEMENT

On March 20, 1950, petitioner, a Maryland corporation, filed suit under the antitrust laws against the eight largest motion picture producers and distributors in the United States, seeking injunctive relief as well as monetary damages for loss incurred as a result of respondent's refusal to license first-run motion pictures to petitioner's theatre, located in the City of Baltimore, during the period from

[1] The designation "SR" in this brief refers to the supplemental record filed herein by respondents. All other record references, designated "R", refer to the record filed by petitioner.

February 1949 to March 1950.[2] Petitioner asserted that the eight respondents, respectively called Paramount, Loew's, RKO, Fox, Warner, Universal, United Artists, and Columbia, had conspired with each other to dominate and and control the distribution and exhibition of motion pictures in Baltimore and elsewhere It was alleged that the discrimination against petitioner was the product of a nationwide conspiracy found to exist among the same distributors in *United States* v. *Paramount Pictures, Inc., et al.*, 66 F. Supp. 323 (1946); 70 F. Supp. 53 (1947); 334 U. S. 131 (1948); 85 F. Supp. 881 (1949) (SR. 1-7)

The case was tried before a jury and resulted in a verdict for the respondents (R. 290a). Petitioner appealed to the Court of Appeals for the Fourth Circuit on the following grounds, inter alia: (1) that the Trial Court should have directed a verdict for petitioner as a matter of law on the issue of conspiracy since the undisputed and uncontroverted evidence, coming largely from respondents, was susceptible of no other conclusion than that respondents deliberately and uniformly participated in a course of conduct which restrained trade, particularly when such course of conduct was viewed against the findings and decision in the *Paramount* Case, *supra*; and (2) that the Trial Court failed to reconstruct adequately for the jury the purpose, scope and effect of the judgments in the *Paramount* case and rejected all requests for instructions submitted by petitioner in accordance with the procedure established by this Court in *Emich* v. *General Motors Corporation*, 340 U. S. 558 (1951), for the purpose of explaining the effect of the rulings in the *Paramount* case.

The Court of Appeals rejected both contentions and affirmed the judgment below (R. 345-361). On the question of conspiracy the Court held that there was evidence to

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[2] A second cause of action sought damages for losses suffered as a result of discriminatory practices to which petitioner's theatre had been subjected even on the first subsequent run which it was granted. Questions relating to this phase of the case have not been raised here.

support both of the inferences drawn by the opposing parties and hence an issue was presented which was properly submitted to the jury for decision (R. 356). On the question of instructions relating to the *Paramount* judgments the Court found nothing detrimental in those given (R. 360-361).

1. The Situation Relating to First-Run Exhibitions in Baltimore

First-run product of respondent companies for years has been divided among eight theatres located in the downtown section of Baltimore (R. 2a-6a). Loew's has operated two of these houses, the Century, seating 3000, and the Valencia, seating between 1600 and 1800. The Valencia is an upstairs theatre used principally as a move-over house, that is, pictures are moved directly from first-run in the Century to the Valencia without any clearance. These two houses exhibit all of Loew's product, half of Universal and some United Artists (R. 2a-4a). Warner Bros. Circuit Management Corporation operates the Stanley which seats 3200 and exhibits all of Warner's and half of Paramount's product (R. 3a-4a).

The other five theatres are owned by independent exhibitors. For many years there has been no change in the division of product as among them. The Keith, operated by Mr. Schanberger, seats 2200 to 2400 and plays half of Universal, half of Paramount, and whatever else it can pick up. The New Theatre, owned by Mr. Mechanic, seats 1300 and has exhibited exclusively Fox pictures for twenty years. The Hippodrome, owned by Mr. Rappaport, seats 1800 to 2000, and exhibits RKO and Columbia pictures. In 1949, Rappaport opened the Town Theatre and thereafter split RKO and Columbia pictures formerly played only at the Hippodrome between the Town and Hippodrome. The Mayfair, owned by Mr. Hicks, seats 800. Although it is located next door to the Stanley the Mayfair has never been able to secure a continuous flow of product from any re-

spondent company. It has operated largely with so-called "slough" or second grade pictures and films of smaller producing companies such as Republic (R. 2a-6a).

Through the years no respondent company licensed its first-run product to any theatre except the eight down-town theatres described above. (R. 6a).

2. Suitability of Crest for First-Run Exhibitions

Early in 1947, petitioner's president, Mr. Myerberg, and his brothers, purchased a fifteen acre tract of land at Reisterstown Road and Rogers Avenue in the City of Baltimore. They built more than fifty homes on that portion of the tract zoned for residential purposes, all of which were sold before completion. Since the commercial life of Baltimore, like that of most large cities, was no longer centered exclusively in the downtown area, the brothers decided that this particular intersection would support a first-class commercial development. They, therefore, undertook the construction of what is now known as the Hilltop Shopping Center. The Crest Theatre was built as a part of the shopping center. A population survey disclosed that approximately 105,000 people lived in the immediate vicinity and that the neighborhood was growing rapidly. (R. 7a-9a).[3]

The Crest Theatre, built and equipped at a cost of over $460,000, is located six miles from the nearest downtown theatre. The seating capacity is 1600 on the first floor with accommodations for 100 more in the loges. It has many innovations. For example, the projection booth is hidden thus eliminating both noise and direct small beam light from the projection machine. It was the first theatre to have a television lounge. This lounge seats 100 people who may view television projected on a screen 6 by 9 feet. Free parking space capable of accommodating 400 cars is available in front, at the side, and in the rear of the theatre. Additional parking space is available on streets surrounding the theatre. The seats are staggered so as to give each patron

[3] By 1951 it had increased to 125,000 (R. 119a).

an unobstructed view of the screen and the rows are spaced apart sufficiently to allow ample knee room. The decorations and appointments are most luxurious. The projection and air-conditioning equipment are the finest obtainable. One of the best examples of carved glass in the entire country is found in the front bay of the theatre over the marquee. The theatre was built so as to handle large crowds comfortably and to accommodate first-run feature pictures (R. 50a-53a).

The qualifications of the Crest are not disputed. It received the International Award of the "Exhibitor Magazine," a well-known trade paper in the motion-picture industry, as one of the finest theatres constructed in the western hemisphere in 1949. The award was presented to Mr. Myerberg by Governor McKeldin of Maryland at public ceremonies (R. 53a).

In addition to recognition by independent persons in the industry the merits of the Crest Theatre were recognized by respondents. Thus, H. J. Martin, Universal Branch Manager, wrote that he had seen the Crest and that it was all Mr. Myerberg had claimed from the standpoint of appointments and capacity (R. 26a). A. C. Benson, Paramount's branch manager, wrote the home office that the Uptown Theatre (a neighborhood Baltimore house) was one of the finest theatres in the country and that the Crest was "equally as beautiful and is larger than the Uptown" (R. 64a). J. B. Brecheen, RKO branch manager, wrote his home office that the Crest will compare very favorably with Mr. Rappaport's new Town Theatre, a downtown house (R. 22a).

High ranking officials of RKO, Paramount, Universal and Columbia agreed that if the Crest had been located downtown it would have had access to first-run pictures. For example, William Zimmerman, an assistant to the Vice President of RKO in charge of domestic distribution and who also assists the President of that company in the formulation of distribution policy, testified that if the Crest was

located in the downtown area of Baltimore it would have the right of access to first-run pictures, that it would be offered a competitive opportunity, and that it had been denied access to RKO pictures first-run only because it was located outside the downtown area. (R. 145a-146a). Fred Myers, Eastern Division Sales Manager of Universal, testified categorically that had the Crest been located downtown it would have been granted access to first-run Universal Pictures (R. 210a-211a). Similar testimony was given by Edward K. O'Shea, Assistant General Sales Manager of Paramount, and formerly Eastern and Southern Division Sales Manager for Loew's (R. 219a),[4] and by George Josephs, the Assistant to the General Sales Manager of Columbia (R. 206a). Robert Smeltzer, District Manager for Warner, hinted that the Crest even in its present location might have been able to license first-run day and date pictures if Warner had owned it. (R. 166a-167a).

3. Efforts of Petitioner to Secure First-Run Film

In January 1948, before ground had been broken for erection of the Crest, Mr. Myerberg visited each of respondents' branch offices in Washington, D.C., informed them of his plans, described the theatre, its size and appointments, and sought first-run pictures. Each branch manager advised him that it was company policy not to discuss or give consideration to such requests until the theatre was built; that after the theatre was completed they would consider film for it. (R. 10a).

In October 1948, when the Crest was under roof, Mr. Myerberg returned to Washington, D. C. and renewed his request for first-run product. He was advised that such matter must be decided by the home offices in New York;

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[4] Mr. O'Shea testified also that a city of 100,000 was certainly capable of supporting a first-run theatre (R. 216a). Mr. Myerberg had previously testified that the area served by the Crest had a population of 105,000 at the time of construction (R. 9a) which had increased to 125,000 by 1951 (R. 119a).

that he should write a letter setting out his request, which would be forwarded to New York for decision (R. 12a). Thereupon, Myerberg wrote identical letters to each respondent, describing the theatre and its special qualifications and requesting access to first-run pictures. The letter to Warner is illustrative (R. 13a-15a).

The branch managers of Warner and Loew told Myerberg that he couldn't expect to secure their first-run since they owned their own theatres in Baltimore and that it was their policy throughout the United States to play their own pictures first-run in their own theatres (R. 11a; 17a).[5] All branch managers expressed surprise that Myerberg should seek first-run pictures for a theatre located outside of the downtown area of the city since it was the general practice in the industry to limit first-run showings to theatres in downtown areas (R. 60a, 145a-146a, 165a, 182a-183a, 218a, 233a).

Myerberg engaged in voluminous correspondence with respondents from October 1948 until the Crest opened on February 26, 1949. (R. 17a-49a; 56a-80a). He was admittedly stalled by RKO (R. 48a), and United Artists and Columbia never replied (R. 28a). He was able to see top officials of only three companies, Fox, Universal and RKO. All his requests met with uniform refusal. (R. 29a, 43a-45a, 50a).

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[5] The evidence introduced in the *Paramount* case showed that the Century and Valencia were operated by Loew but owned only 50% by Loew with the other 50% owned by United Artists Theatre Circuit, Inc. Appendix to Government's Brief, p. 225, footnote 14, Exhibit 214, *United States* v. *Paramount Pictures, Inc., et al.* 334 U. S. 131. In speaking of such joint ownerships this Court said that the result was to eliminate competition *pro tanto* both in the exhibition and in the distribution of feature films because the parties naturally would direct the films to the theatres in whose earnings they were interested. It said: "The practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine." (334 U.S. 131, 149).

Myerberg made specific offers to Universal, RKO, Columbia, and Paramount for particular pictures for first-run exhibition. These offers included substantial guarantees of film rental and a readiness to post certified checks. Such offers were either rejected or ignored (R. 45a, 55a, 58a, 77a, 78a, 80a, 81a, 82a).

During the trial Myerberg offered Fox $15,000 for an extended first-run of the picture "Diplomatic Courier" which was accepted by Mr. Lichtman, Director of Distribution for Fox who was then on the witness stand (R. 174a). However, when Myerberg's certified check for that amount was tendered the following day it was rejected (R. 205a-206a).

Petitioner opened February 26, 1949, by exhibiting, under protest, pictures on first subsequent run. Thereafter, he continued his efforts to secure first-run product by engaging counsel who, for another six months, corresponded directly with the home offices of all respondents in a further unsuccessful attempt to secure first-run film. (R. 59a, 79a-81a, 84a-92a). Suit was then filed.

Since the Crest is located six miles from the nearest downtown first-run theatre, petitioner was of the opinion that the Crest was too far out to be considered in substantial competition with the downtown theatres. Hence, at all times, petitioner has been ready and willing to exhibit respondents' pictures on first-run day and date with any of the downtown houses, and to pay the same film rentals for a day and date or an exclusive first run. But since respondents insisted that the Crest was or would be in substantial competition with the downtown theatres, petitioner has always been willing to negotiate or bid competitively against the downtown theatres for the right to exhibit pictures on an exclusive first-run (R. 90a-95a).

4. Reasons Offered by Respondents for Uniform Rejection of Petitioner's Requests for First-Run Product

Respondents uniformly denied petitioner an opportunity to compete for first-run product but uniformly granted petitioner first subsequent run (R. 50a). Not a single home office executive with ultimate responsibility for making the decision saw the Crest before it was uniformly denied first-run and uniformly granted first subsequent-run pictures (R. 50a).

The chief reason advanced by each respondent for denial of first-run product to petitioner was the existence of a nationwide policy which had been in existence for many years under which, with minor exceptions noted hereinafter, the licensing of films for first-run exhibition was confined to the downtown area of cities.

William Zimmerman, the Assistant to the Vice-President of RKO in charge of domestic distribution, and who also assists the President of RKO in the formulation of distribution policy and in the handling of exhibitor relations, testified that it was the policy of his company to deny access to RKO pictures to theatres located outside the downtown area in all cities, including Baltimore, and that this policy was applied regardless of how fine the neighborhood theatre might be. (R. 145a-146a, 150a).

Robert Smeltzer, District Manager for Warner, testified that wherever possible his company confined the licensing of first-run films to downtown areas; that such is the general policy of the company nationwide; that such policy is pursued wherever possible and every effort is made to follow such a policy; that insofar as the application of the Crest for first-run product was concerned he didn't have to take the matter up with the New York executives because of the existence of such policy (R. 164a-165a).

Alexander Lichtman, Director of Distribution for Fox, testified that he was one of those who took part in establishing nationally the practice of the industry of confining the licensing of first-run films to downtown areas. He stated that the theory of distribution of feature films from

its inception was to have a representative first-run theatre in each of the large cities of the country which could attract the greatest number of patrons; that such a theatre would be used as the exploitation point for the territory; that it would be shown on subsequent run in other theatres at smaller admission prices so that all classes would be able to view it; that there has never been any basic change in this policy (R. 182a-183a).[6]

William F. Rodgers, for 16 years the General Sales Manager of Loew's, testified that the policy of confining first-run product to theatres located in downtown areas had existed as long as he could remember; that it was a definite practice of Loew's, even though Loew's was obligated to license its product theatre-by-theatre; that the general objective of all the major distributors was to confine first-run exhibitions to downtown theatres. (R. 233a-234a).

Edward K. O'Shea, who had been the Eastern and Southern Sales Manager for Loew's for many years before becoming the Assistant General Sales Manager of Paramount, testified that Paramount maintains a national policy which limits the showing of pictures on first-run to houses located only in the downtown areas of cities (R. 218a). George M. Josephs, Assistant to the General Sales Manager of Columbia wrote that it had been the policy of his company not to recognize requests of neighborhood houses for first-run product (R. 60a). Representatives of Universal gave similar testimony. (R. 213a).[7]

In his opening statement Counsel for respondents expressed shock that petitioner, by requesting first-run product for a neighborhood theatre, would "thus change the

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[6] Lichtman was the highest ranking official appearing on behalf of any respondent at the trial. He entered the motion picture industry in 1910, and at various times has been Sales Manager of the old Famous Players Film Company, the General Manager of Paramount Pictures, the Vice-President and General Manager of United Artists and later its President, and the Vice-President of Loew's, Inc. (R. 167a-169a).

[7] United Artists called only a former Branch Manager who knew nothing of the situation. (SR. 684-685)

entire manner and method that has been in existence in this State, and most of the States in the United States for years and years" for licensing first-run film. (R. 1a).

Although other purported "business" reasons were advanced by respondents for denying petitioner an opportunity to compete for first-run product, they were in reality attempted justifications for maintenance of the national policy embraced by all. The most often repeated justification was that they had "satisfactory customers" of long-standing in the downtown areas and saw no reason to disturb such relations by attempting to sell their product to others (R. 144a, 148a). They also claimed that the Crest could not successfully play first-run film, although they admitted that with rare exceptions mentioned hereafter where they owned neighborhood theatres they had never experimented with such an idea and wouldn't experiment with it. (R. 147a, 150a, 230a).

The record contains additional facts which supply the real economic motivation for limiting the showing of first-run pictures to downtown theatres in accordance with respondents' national policy. Respondents produce and distribute most of the important and desirable feature motion pictures in the United States. (R. 142a). Five of the defendants, Loew's Warner, Paramount, RKO and Fox owned hundreds of theatres located in the largest cities throughout the United States during the damage period (R. 126a-127a, 138a).[8] Most of the theatres exhibit pictures on first-run and almost all of the first-run theatres are located downtown (R. 139a, 176a). These five respondents admitted the existence of cross-licensing among them and the payment to one another of substantial sums for film rental (R. 178a, 203a, 230a).

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[8] The final decree in the *Paramount* case required these majors to divest themselves of their theatre holdings. They were given a period of from 1 to 3 years to achieve such separation. The separation with respect to Loew, Fox and Warner was not to be finally effected until 3 years from the entry of the final degree which was dated February 2, 1950.

Charles V. Grimes, District Manager for Warner Bros. Circuit Management Corporation, admitted that his company opposed the granting of first-run to the Crest and other neighborhood theatres because "it would destroy" Warner Bros. Stanley and all other downtown houses and that they simply didn't want the Crest competing with the Stanley (R. 162a). Similarly, Robert Smeltzer, District Manager for Warner, admitted that he opposed first-run for the Crest and other neighborhood houses because "it would mean the elimination of the downtown theatre" (R. 163a). William F. Rodgers, General Sales Manager for Loew's, feared that if neighborhood theatres were given access to first-run film Loew's revenue from exhibitions of its pictures in the downtown first-run houses operated by Fox, Warner, RKO and Paramount would be considerably curtailed (R. 230a).

It is clear from the record that each of the respondents was aware that each of the other respondents was adhering to the identical national policy of denying first-run products to the Crest, as well as to all other theatres located outside of the downtown section of cities no matter how fine they might be and regardless of the amount of film rental offered. As Mr. Zimmerman of RKO pointed out, all one had to do to be aware of such facts was to look in the papers (R. 150a). Moreover, the knowledge of all respondents concerning the theatre ownership of the Big Five as well as the location of more all of their first-run theatres in downtown areas of cities, is undisputed. Each respondent also knew of the cross licensing of films and of the substantial revenues derived from each by such practice.

The record in this case contains an abundance of additional testimony which is persuasive of the knowledge of each respondent that the others were denying first-run film to neighborhood theatres, particularly the denial to the Crest. For example, the Washington Branch Manager of Paramount wrote his home office before the Crest opened, telling them what each of the other respondents was going to do and recommending that Paramount do the same thing.

(R. 66a). The Branch Manager of Fox testified that his company "did what everyone was doing." (R. 192a).

The frequent interchange of top sales and distribution personnel is additional evidence showing the knowledge by each respondent of the decisions of the others in denying first-run to suburban theatres. Thus, Alexander Lichtman has been successively General Sales Manager for Paramount, Vice-President and General Sales Manager and later President of United Artists, Vice-President of Loew's and Vice-President of Fox (R. 167a). The President of Fox, Spyros Skouras, is a lifelong friend of Lichtman (R. 168a). Charles Skouras, a brother of Spyros Skouras, heads the Fox subsidiary which operates approximately 500 theatres, many of which are first-run downtown houses (R. 176a). Joseph Schenk, a top executive of Fox, is a brother of Nicholas Schenk, President of Loew's, Inc. (R. 175a). Andrew Smith, who preceded Mr. Lichtman as Sales Manager of Fox, had earlier held similar positions with RKO and Warner (R. 140a). Mr. Smith's successor as General Sales Manager of RKO, Mr. Robert Mochrie, was a sales executive with United Artists and Warner before transferring to RKO (R. 140a). Samuel Goldwyn, whose pictures are distributed by RKO was formerly a chief executive of United Artists (R. 141a). Howard Minsky, a Fox official who participated in discussions concerning the Crest, is now with Paramount (R. 176a). Charles Reagan, General Sales Manager for Loew's, formerly occupied a similar position with Paramount (R. 177a). Edward K. O'Shea, Assistant General Sales Manager of Paramount, was formerly with Loew's (R. 177a). Mr. Blumberg, President of Universal, was formerly Vice-President of RKO (R. 178a).

Respondents recognized that their denial of first-run to the Crest had the effect of confining first-run to the downtown area (R. 150a) and of fixing the terms and conditions and manner in which this new $460,000 theatre could compete in the exhibition field (R. 189a, 208a).

5. Exceptions to the National Policy of Confining First-Run Product to Downtown Areas

In a few instances respondents have departed from their national policy of confining the licensing of first-run film to downtown theatres. These exceptions occur where respondents own neighborhood houses and permit them to play day and date with downtown theatres owned by themselves, or where an independent located near one of respondents' first-run suburban houses threatens suit on grounds of discrimination if it is denied the opportunity to compete for first-run product.

Illustrative is the situation in Washington, D. C. There, Warner owns and operates a first-run theatre, the Warner, in the downtown area and also owns another theatre, the Ambassador, located approximately 2½ miles from the downtown area. The Warner seats 2154 and the Ambassador 1344. For years the Ambassador has played Warner, Paramount and Columbia first-run product day and date with the Warner downtown house. (R. 69a; SR. 626-627).

In 1951 an independent exhibitor built the Ontario Theatre, seating 1301, at a cost of half a million dollars. It was located two blocks from the Ambassador (R. 69a). The Ontario sought first-run day and date on Paramount pictures showing downtown that were not played at the Ambassador. This request was transmitted by the Washington Branch Manager to a member of the legal department in Paramount's New York office. In replying Mr. Gibbons, the lawyer, said no immediate decision need be made since the theatre was still under construction; that the problem would have to be met at some future date, at which time the request would have to be granted or denied, but that an exclusive first-run in Washington was out of the question (R. 68a). In his reply the Branch Manager agreed that no action need be taken at that time since the theatre had not yet reached the completion stage (R. 70a).

The dilemma confronting respondents as a result of the request of the Ontario for first-run film was illustrated in

their correspondence. Paramount's Washington Branch Manager wrote his superiors that the demand, if pushed, "can result in a real whopper" and "could lead to one fine mess" (R. 70a). He warned that "this is a rather ticklish situation as you can readily understand" (R. 72a). Mr. Gibbons "stressed the importance of the matter" and felt "that a conference should be held relative to it." (R. 74a).

The matter was finally resolved by giving the Ontario an exclusive first-run on Paramount pictures (R. 69a, 216a). Paramount's Assistant General Sales Manager admitted that the Ontario was granted exclusive first-run because Warner's Ambassador had for years been granted access to Paramount's product first-run; that a denial of first-run to the Ontario might have laid the company open to an accusation of discrimination, and that such a charge might have resulted in a lawsuit (R. 218a).

A similar situation developed in Wichita, Kansas, where Fox owned the Fox Boulevard Theatre, a neighborhood house located more than four miles from the downtown area and which was exhibiting RKO and Paramount pictures on first-run. Two new independents, the Crest and the Tower, located in the same area as the Boulevard, sought and received first-run product.

In reluctantly granting the Crest in Wichita, Kansas access to first-run, William Zimmerman, of RKO, Assistant to the Vice-President in charge of domestic distribution and Assistant to the President in the formulation of distribution policy and the handling of exhibitor relations, wrote Counsel for the Crest saying that in a city the size of Wichita, RKO's pictures were best marketed and their exhibition possibilities most fully realized if their first-run showing was confined to downtown; that the present playing position of RKO pictures in the Crest (subsequent run) was appropriate for their neighborhood, but that "in an effort to avoid litigation between us, we have decided to afford your client's Crest Theatre and the competitive Tower Theatre an opportunity to obtain our pictures on an exclu-

sive first-run in the City of Wichita." (R. 102a). Paramount made a similar concession to the Tower Theatre. In writing to the Kansas City branch office of Paramount, a member of that company's legal department wrote: "Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discriminating in favor of Fox, if we do not offer a comparable theatre the same opportunity (R. 105a).

In a few other situations respondents ignored the so-called business reasons advanced for denying first-run to the Crest Theatre in Baltimore in the instant case and granted first-run to neighborhood theatres owned by them. This occurred in Kansas City (R. 90a) and Denver where Fox owned neighborhood houses (R. 204a), in Boston where Loew's owned such a house and in Los Angeles where a number of respondents owned theatres located outside the downtown area (R. 204a). The reason for such departures was rather lamely explained by A. W. Smith, Jr., Vice-President in Charge of Distribution for Fox when explaining the Kansas City situation. He wrote that the neighborhoods concerned were "operated by our own subsidiaries, and we felt that we had greater room for experiment when we were showing our own pictures in our own theatres" (R. 90a).

It is apparent that the threat of litigation on a charge of discrimination is occasionally sufficient to cause respondents to relax their commonly pursued national policy of uniformly refusing to license first-run pictures outside the downtown areas of cities. It is equally clear that respondents are willing to make exceptions to the national policy where they themselves own the neighborhood theatres concerned.

Despite protestations that departures from the national policy would be bad business, would harm the first and subsequent run revenues, and would result in the elimination of downtown theatres, respondents' witnesses admitted that

the few exceptions made to the national policy had proved successful (R. 161a, 204a, 227a) and, contrary to their predictions, the subsequent-run theatres as well as the downtown houses had continued in business (R. 185a).

6. The Trial Court's Instructions Relating to the Purpose, Scope and Effect of the Judgments in the Paramount Case.

Pursuant to Section 5 of the Clayton Act (15 U.S.C. Sec. 16) petitioner offered in evidence pertinent provisions of the decrees entered in the *Paramount* case.[9] The offer was made in accordance with the procedure established by this Court in *Emich* v. *General Motors Corporation*, 340 U. S. 558 (1951).

This offer was made three times. The decrees[10] were first proffered immediately after the close of the opening statement (SR. 116-117). After argument the trial court refused to admit them but said such ruling was made without prejudice to petitioner to renew its motion either during the course of the trial or at the close of the testimony. (SR. 220-222). The offer was renewed at the close of the petitioner's case in chief and again refused (SR. 482-483). At the close of all the testimony, and immediately preceding the summations to the jury, the offer was again renewed,

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[9] *United States* v. *Paramount Pictures, Inc., et al*, 66 F. Supp. 323 (1946); 70 F. Supp. 53 (1947); 334 U. S. 131 (1948); 85 F. Supp. 881 (1949).

[10] Four decrees eventually emerged from the *Paramount* litigation. The first was a consent judgment against RKO, entered on November 8, 1948. The second was a consent judgment entered against Paramount on March 3, 1949. These consent judgments were entered after the remand from the Supreme Court to the Statutory Court. No additional testimony was taken after remand insofar as RKO is concerned. Some additional testimony was taken after remand but before entry of consent judgment against Paramount. Two decrees were entered at the conclusion of all the litigation, on February 8, 1950, one against the three remaining major defendants, Loew, Fox and Warner; the other against the three minor defendants, Columbia, Universal and United Artists. As to all important features applicable to the instant case the four decrees were substantially identical. [See record in *Loew's Inc.* v. *United States*, 339 U.S. 974 (1950)]

and, after lengthy argument, petitioner was permitted to read to the jury four paragraphs common to all four decrees which provided that the defendants were enjoined: (1) from agreeing to maintain a system of clearances;[11] (2) from granting any clearance between theatres not in substantial competition;[12] (3) from granting other than reasonable clearance against theatres in substantial competition, with the burden of proof to sustain the legality of any such clearance under attack to be borne by the distributor making the clearance arrangements;[13] and (4) from licensing any feature on any run in any theatre except on the basis that each license shall be offered and taken theatre by theatre, solely on the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.[14] (SR. 1002-1004)

At the insistence of respondents an additional paragraph was read to the jury which permitted the five defendants owning theatres to continue, during the period set for the separation of their business of distribution and production from their exhibition business, to exhibit their own pic-

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[11] Par. II, 2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres. (SR. 1003)

[12] Par. II, 3. From granting any clearance between theatres not in substantial competition. (SR. 1003)

[13] Par. II, 4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof. (SR. 1003)

[14] Par. II, 8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others. (SR. 1004) (This provision appears in the decrees as to all defendants except RKO.)

tures in their own theatres, on their own terms.[15] (SR. 1004-1005)

In order that the jury might be properly apprised of the scope, purpose, and effect of the *Paramount* judgments, as required by the procedure established by this Court in the *Emich* case, particularly with respect to the impact of such judgments on the instant case, petitioner submitted sixteen proposed instructions all of which were refused. (R. 295a; 299a-303a).

These instructions may be summarized as follows: that the respondents in this case were all found guilty in the Government suit of conspiring to fix uniform runs and clearances and of imposing unreasonable clearances;[16] that any system of clearances which has acquired a fixed and uniform character and which is applied to situations without regard to special circumstances necessary to sustain them as reasonable restraints of trade violate the antitrust laws;[17] that the five theatre-owning defendants, Warner, Paramount, Fox, Loew's and RKO have been adjudged guilty of fixing runs and clearances for the purpose of limiting competition offered by independents to theatres owned by them;[18] that as a result of their country-wide theatre holdings the Court found as a fact that the best customers of each of the big five defendants were usually one or more

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[15] Typical of this proviso is Par. V of the decree against Loew, Fox and Warner which reads: "Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or indirectly." (SR. 1004-1005). The period for divestiture allowed RKO was one year from the date of entry of the decree, and for Paramount one year. The effective date for each actually was January 1950.

[16] Petitioner's proposed instruction No. 75 (R. 301a).

[17] Petitioner's proposed instruction No. 31 (R. 295a).

[18] Petitioner's proposed instruction No. 76 (R. 301a-302a).

of the other defendants;[19] that the Government case adjudicated that clearances and runs fixed illegally by defendants have frequently disadvantaged independent exhibitors trying to compete with theatres owned by defendants, or by large circuits or other favored exhibitors;[20] that the Government case adjudicated that the clearances and runs fixed illegally by defendants frequently worked to the disadvantage of exhibitors attempting to break into the field with new theatres and compete with exhibitors who were old customers of defendants;[21] that the Government case had adjudicated that all defendants had failed in their legal duty to license pictures solely on the merits of the theatre involved, but had discriminated against some exhibitors in favor of others in the runs and clearances granted their theatres;[22] that the decrees in the *Paramount* case constitute *prima facie* evidence that the defendants conspired to fix runs and clearances in violation of law;[23] that the past proclivity of these defendants for violating the antitrust laws is such that the Court has hitherto recognized a strong temptation on the part of the same defendants to continue their same illegal distribution practices.[24]

More particularly the Court was asked to give the following instructions, also based upon the *Paramount* case, namely, that the power of these defendants to fix runs and clearances existed and was exercised to exclude independents who were or wished to be competitors in the first-run field;[25] that the Court in the *Paramount* case found that these defendants actually excluded independents from the first-run field approximating in the aggregate 70 per cent of the first-run theatres in the 92 largest cities of the coun-

[19] Petitioner's proposed instruction No. 74 (R. 301a).
[20] Petitioner's proposed instruction No. 77 (R. 302a).
[21] Petitioner's proposed instruction No. 78 (R. 302a).
[22] Petitioner's proposed instruction No. 79 (R. 302a).
[23] Petitioner's proposed instruction No. 80 (R. 302a).
[24] Petitioner's proposed instruction No. 73 (R. 301a).
[25] Petitioner's proposed instruction No. 71 (R. 301a).

try of which Baltimore is one;[26] that defendants were guilty of abusing their discretion in deciding what theatres should be granted first-run and what clearance should be granted a particular theatre;[27] that defendants have a duty to license their product, picture by picture and theatre by theatre, without discrimination in favor of affiliated theatres, circuit theatres or others;[28] that defendants have the burden of establishing the reasonableness of the clearance imposed upon the Crest;[29] and that the system of preferring old customers has been used by these defendants in the past as an excuse for a fixed system of runs and clearances and was to that extent unlawful.[30]

These instructions were necessary to reconstruct the *Paramount* case "in the manner and to the extent necessary to acquaint the jury fully with the issues determined therein," and to "explain the scope and effect of the former judgment on the case at trial," as provided by this Court in the *Emich* case (340 U. S. 558, 572).

The trial court refused all of these instructions. Instead he explained the purpose, scope and effect of the voluminous proceedings in the *Paramount* case in exactly five sentences which covered only twenty-seven lines of the transcript. He charged as follows (R. 273a):

> "I instruct you that in the previous equity suits between the Government and these same defendants, which have been referred to as the Paramount case,—you will recall I allowed the decree in that Paramount case to be introduced in evidence by the plaintiff,—I instruct you that in that case, which was a suit between the Government and the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in re-

[26] Petitioner's proposed instruction No. 70 (R. 300a-301a).
[27] Petitioner's proposed instruction No. 72 (R. 301a).
[28] Petitioner's proposed instruction No. 83 (R. 303a).
[29] Petitioner's proposed instruction No. 93 (R. 303a).
[30] Petitioner's proposed instruction No. 61 (R. 299a).

straint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima facie* evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable."

In accordance with the decree provision in the *Paramount* case requiring a distributor to sustain the burden of proof whenever any clearance provision is attacked as illegal (SR. 1003), petitioner sought an instruction to the effect that the respondents had the burden of establishing the reasonableness of the clearance imposed upon the Crest.[31] Instead, the trial Court reversed the burden of proof in such circumstances and charged as follows: (R. 273a)

"If you find that the plaintiff has sustained this burden of proving a conspiracy as just defined, then, I instruct you that, by virtue of the terms of the decrees in the previous equity suit, which form part of the evidence in this case, the burden of proving the reasonableness of the failure to give the plaintiff first run exclusively or day and date, that is questions of clearance, as well as the failure to give it any other clearance such as would be reasonable, rests not upon the plaintiff but upon the defendants."

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[31] Petitioner's Requested Instruction 93 (R. 303a).

Again, on the question of clearance, petitioner, in accordance with the provision in the *Paramount* decrees prohibiting the granting of any clearance between theatres not in substantial competition (SR. 1002-1003), sought an instruction to the effect that if the jury found that the Crest was not in competition with theatres owned by Warner and Loew then clearance between the Crest and the Warner and Loew houses would be improper (R. 302a-303a). Instead, over objection, the trial Court instructed the jury that Loew and Warner had an unqualified right to show their own pictures in their own houses. (R. 271a).

The Court of Appeals found "nothing detrimental to the plaintiff in these instructions."[32]

SUMMARY OF ARGUMENT

Since there was no factual conflict for the jury to resolve, the Court below erroneously affirmed the action of the trial Court in refusing to grant a directed verdict for petitioner on the question of conspiracy at the close of all of the evidence.

Respondents admitted that for many years, both before and after the decision of this Court in *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131, it had been the national policy of each to confine the exhibition of feature films to theatres located in the downtown areas of cities, including Baltimore; that each was aware that every other respondent followed the same policy; that each knew that the common policy of all could not be maintained in the absence of common action by all of them; that in rare situations exceptions to the national policy had been made, but only in circumstances where a neighborhood theatre was owned by one of them or to avoid the obvious discrimination which would result from denial of such a run to independents in such circumstances.

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[32] *Theatre Enterprises* v. *Paramount Film Distributing Corp., et al.*, 201 F. 2d 306, 315.

The uncontradicted evidence also showed that five of the respondents owned hundreds of theatres throughout the United States, many of which were first-run houses and virtually all of which first-run houses were located in the downtown areas of cities; that all the respondents license their feature pictures on first-run to the downtown theatres owned by these five respondents, and that substantial revenues are derived by all the respondents as a result of such cross-licensing.

The undisputed evidence disclosed further that petitioner's Crest Theatre seated 1600, was built at a cost of $460,000, and was comparable in seating capacity, size, equipment and appointments to the downtown theatres in Baltimore which were granted first-run product; that the Crest was located six miles from the nearest downtown theatre; that petitioner was willing to pay and had offered to pay by certified check film rentals equal to or greater than those actually received by respondents from their existing first-run accounts in Baltimore.

Respondents admitted that had the Crest been located downtown it would have been afforded an opportunity to compete for first-run product. They also admitted that their decision to deny first-run to the Crest resulted from the application of their national policy to confine first-run exhibitions to downtown theatres and had no necessary relationship to the particular circumstances involving the Crest Theatre.

Respondents denied concert of action in maintaining their exclusionary policy, insisting that each of them exercised its independent business judgment which resulted in identical solutions to a common business problem. Each of them insisted that it confined first-run exhibitions to theatres located in downtown areas because such theatres drew larger crowds and have produced the largest revenues; because downtown theatre investments would be destroyed if neighborhood theatres were licensed first-run; because the downtown theatres had been satisfactory customers of long

standing, and because the Crest would not be successful as a first-run house and hence they refused to experiment with it on a first-run basis.

Since evidence showing merely that respondents had a common business purpose for excluding petitioner from the first-run market is irrelevant to a showing that they did not conspire to do so, there was no relevant evidence from which the jury could have drawn an inference that respondents did not conspire. Hence, the case of conspiracy proved by petitioner was the only relevant evidence with respect to the question of conspiracy, and the trial court should have directed a verdict for petitioner on that point and should have submitted to the jury only the question of the amount of damages suffered by petitioner. This is particularly true in view of this Court's finding in the *Paramount* case that these same respondents had conspired to impose a uniform system of runs and clearances without regard to the special circumstances necessary to sustain them as reasonable restraints of trade. A uniform system of runs and clearances was the device used here to deny petitioner access to first-run product.

Under this Court's decisions the type of conduct established by petitioner's case in chief has been equated with conspiracy. This Court has held also that evidence showing a conspiracy to impose unreasonable restraints upon commercial competition cannot be rebutted by evidence showing business necessity, economic motives, or good intentions.

Viewed in the light most favorable to respondents the uncontested and uncontradicted evidence clearly established the existence of a conspiracy in Baltimore and elsewhere to foreclose petitioner and other neighborhood theatres similarly situated from an opportunity to compete in the first-run market. Respondents have erected a fence around the suburban theatre and relegated it to subsequent run status. By such action respondents are continuing their efforts to monopolize the cream of the business, the lucra-

tive first-runs which this Court in the *Paramount* case decrees should be opened to competition.

The Court below erred in affirming the action of the District Court which had refused an adequate explanation to the jury as to the background, scope and significance of the *Paramount* case and its impact upon the instant case. The Court below erred further in affirming the action of the District Court which had instructed the jury that it was still necessary for petitioner to prove conspiracy despite the legal effect of the *Paramount* judgments because the present factual situation had not been before the Court in the *Paramount* case. These errors denied to petitioner the benefits to which he was entitled under Section 5 of the Clayton Act as interpreted by this Court in *Emick* v. *General Motors Corporation*, 340 U. S. 558.

The District Court refused to permit petitioner to introduce the decrees in the *Paramount* case until a moment before it charged the jury on the entire case. Thus, the jury was afforded no opportunity to evaluate the evidence relating to the local situation in Baltimore against the background of the Government's lengthy litigation with these same respondents on the identical question of clearances and runs.

Despite full instructions requested by petitioner, which were denied, the District Court, contrary to the clear guide laid down by this Court in the *Emick* case, failed to examine the record in the *Paramount* case for the purpose of determining the issues decided by these judgments, failed to reconstruct that case in the manner and to the extent necessary to acquaint the jury fully with the issues therein determined, and failed to explain the scope and effect of those judgments on the instant case. The practical effect of such failure to charge was to nullify the evidentiary effect of the *Paramount* decrees and to deprive petitioner of the benefits of Section 5 of the Clayton Act. Petitioner was required to prove the issue of conspiracy *de novo* despite the fact that such issue had previously been resolved against respondents.

ARGUMENT

I

Since the Admitted and Undisputed Facts Constituted a Violation of the Sherman Act as a Matter of Law Petitioner Was Entitled to a Directed Verdict at the Close of All of the Evidence

At the close of all the evidence petitioner requested the Trial Court to instruct the jury that they must return a verdict for the petitioner in such amount as they estimated petitioner's loss to have been. In effect, the Court was asked to instruct a verdict for petitioner and to submit to the jury's decision only the question of the amount of damages suffered by petitioner. This request was refused (SR. 973). In affirming the judgment the Court of Appeals held "that there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was necessarily submitted to the jury for decision." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp., et al.*, 201 F. 2(d) 306, 313.

Usually the question of whether defendants have violated the Antitrust laws depends upon disputed factual issues which can only be resolved by submitting the case to a jury or to a court sitting as both judge and jury. In this case, however, it is submitted that the undisputed and uncontradicted evidence, supplied largely by respondents, admits of no reasonable conclusion other than that respondents knowingly, deliberately and uniformly participated in a common course of conduct which unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures in Baltimore and elsewhere.

This is especially true when respondents' conduct here is measured against the background and findings in the *Paramount* case. While the decrees in that case were offered as prima facie evidence of all matters with respect to which such decrees would constitute an estoppel as between respondents and the Government, the *Paramount* case has

added significance here since it held that these same respondents had conspired with each other to fix a uniform system of runs and clearances on a nationwide basis without regard to local factual situations, and that such conduct constituted an unreasonable restraint of trade in violation of the Sherman Act. *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131, 146-147.

In uniformly denying petitioner first-run and in uniformly granting it first subsequent run, respondents admittedly were applying to a local situation in Baltimore a national policy adhered to by each of them the effect of which was to impose a fixed and uniform system of runs and clearances without regard to the local circumstances herein involved.

Respondents do not deny that such conduct would constitute a violation of the Sherman Act if done as a result of conspiracy. Indeed they could not in view of this Court's oft-repeated pronouncement that exclusion of a competitor from a substantial part of the market constitutes a *per se* violation of the anti-trust laws. *International Salt Co.* v. *United States*, 332 U. S. 392, 396; *United States* v. *Griffith Amusement Co., et al.*, 334 U. S. 100, 107; *Times-Picayune Pub. Co.* v. *United States*, 97 L. ed. 819, 829. Rather, they insist that petitioner's admitted inability to obtain first-run product for its Crest theatre, either on an exclusive or a day and date basis, was the natural result of the exercise by each respondent of its independent business judgment resulting in the similar solution of a common business problem.

Before treating with the undisputed and uncontradicted evidence relating to petitioner's proof of conspiracy and respondents' failure to offer any relevant defense to such proof we think it helpful to review briefly the findings and conclusions in the *Paramount* case since the local situation here grew out of and is an integral part of that litigation

in which these same respondents were parties defendant.[34]

In the *Paramount* litigation the District Court found that the eight distributor defendants (the respondents here) had conspired to establish a uniform system of runs and clearances[35] for theatres to which they licensed their films; that the exhibitor defendants had assisted in creating and had acquiesced in such system, and that such conduct violated the Sherman Act;[36] that both independent exhibitors and distributors, in attempting to bargain with defendants had been met by a "fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with defendants' theatres or with theatres to which the latter have licensed their pictures;" that under the circumstances disclosed in the record "there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained." The Court concluded that competition could be effected in the present system of clearances and runs only by requiring a defendant when licensing its pictures to others "to make each picture available at a

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[34] The time sequence is significant. The damage period in the instant case was from February 1949 to March 1950. (R. 260a). The first decision of the Statutory Court was made on July 26, 1946 (66 F. Supp. 323), and the supporting findings were entered on December 31, 1946 (70 F. Supp. 53). New findings were entered by the Statutory Court (after remand from this Court) on February 2, 1950 (85 F. Supp. 881) and on the same day final judgments were entered as against six of respondents. The judgment against the three majors was affirmed by this Court per curiam on June 5, 1950 (339 U. S. 974).

[35] The relationship between clearance and run was explained by the District Court as follows: "Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with run as to make comment on one applicable to the other." (66 F. Supp. 323, 345).

[36] 66 F. Supp. 323, 343.

minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run."[36]

The District Court concluded as a matter of law that the distributor defendants had unreasonably restrained trade and had attempted to monopolize trade in the distribution and exhibition of motion pictures in violation of the Sherman Act by: (1) "Conspiring with each other to maintain a nationwide system of runs and clearances which is substantially uniform as to each local competitive area;" (2) "agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits;" (3) "agreeing individually with such licensees to grant unreasonable clearance against theatres operated by their competitors."[37] It found further as a matter of law that the exhibitor-defendants had unreasonably restrained trade and had attempted to monopolize trade and commerce in the distribution and exhibition of motion pictures by: (1) "conspiring with each other and with the distributor-defendants to fix substantially uniform minimum motion picture theatre admission prices, runs, and clearances;" (2)

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[36] Ibid, p. 346.

The Court said the following factors should be considered in determining the reasonableness of clearance (Ibid, p. 343).

(1) The admission prices set by the exhibitors involved
(2) The character and location of the theatre involved, such as size, type of entertainment, appointments, transportation facilities
(3) Policy of operating theatre involved, such as showing double features, give-aways, gift nights, premiums, lotteries, cut-rate tickets, etc.
(4) Rental terms and license fees paid by theatre involved and revenues derived from such theatre by defendants
(5) Extent to which theatres involved compete with one another for patronage
(6) Fact that the theatre involved is affiliated with a defendant distributor or with an independent circuit of theatres
(7) There should be no clearance between theatres not in substantial competition.

[37] 70 F. Supp. 53, 72.

"conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance and other license terms."[38]

The District Court then enjoined each distributor-defendant from: (1) "agreeing with each other or with any exhibitors or distributors to maintain a system of clearances;" (2) "granting any clearance between theatres not in substantial competition;" (3) "granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted" and (4) provided that whenever any clearance was attacked as illegal the burden shall be upon the distributor to sustain its legality. It decreed further that: (1) each picture should be licensed "solely upon the merits and without discrimination in favor of affiliates, old customers or others," and (2) that "each license shall be offered and taken theatre by theatre and picture by picture."[39]

The principal remedy provided by the District Court was a judicially supervised system of competitive bidding which the Court thought would give independent exhibitors an opportunity to compete, as to each feature picture released, for the preferred runs which independents had been prevented from obtaining as a result of the conspiracy since the same offer would be made to all prospective exhibitors in a community.[40]

On appeal this Court affirmed the findings of law violation, vacated those provisions of the decree which were inconsistent with divorcement, and remanded the case for further consideration of that relief.[41]

In approving the findings and conclusions of the District Court in regard to clearances and runs this Court

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[38] Ibid, p. 72.

[39] Ibid, pp. 73, 74.

[40] 66 F. Supp. 323, 358; 70 F. Supp. 53, 74.

[41] 334 U. S. 131.

held that there was sufficient evidence to show that "many clearances had no relation to the competitive factors which alone could justify them;" that the clearances in use had "acquired a fixed and uniform character and were made applicable to situations without regard to special circumstances which are necessary to sustain them as reasonable restraints of trade;" that the evidence was ample to sustain the finding of the District Court "that the defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence," and that such evidence was "adequate to support the finding of conspiracy to restrain trade by imposing unreasonable clearances."[42]

On remand the District Court held that there should be divorcement and divestiture relief against the five major defendants because such relief was necessary to end the conspiracy.[43] New findings were entered which reaffirmed the earlier findings as to the nature and scope of the conspiracy and findings were added to the effect that affiliation of the distributors with first-run theatres provided an incentive for their illegal conduct.[44] The two final judgments entered on February 8, 1950, left the 1946 declaration of the prima facie invalidity of defendants' clearance systems unchanged and added a provision to the effect that no feature could be licensed "for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others."[45]

In summary, the *Paramount* case adjudicated the following in reference to clearance and run: (1) that the distributor-defendants (respondents here) conspired to evolve and maintain a uniform system of clearance and run; (2) that defendants imposed arbitrary and unreasonable clear-

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[42] Ibid, pp. 146-147.

[43] 85 F. Supp. 881, 893-894, 895-896.

[44] Ibid, pp. 888-889.

[45] Sec. II, Par. 8 (S.R. 1004).

ances; (3) that such clearances had acquired a fixed and uniform character and were imposed without regard to the local circumstances to which they were applied; (4) that the system of runs and clearances evolved by or acquiesced in by all the defendants discriminated against independent exhibitors which were in competition with exhibitors affiliated with defendants; (5) that this system of runs and clearances discriminated against new theatres attempting to enter into the exhibition field and in favor of established customers of defendants; and (6) that one of the purposes of maintaining such a system of runs and clearances was to exclude competition with theatres owned and operated by defendants.

Against this background of unlawful conduct with respect to run and clearance, which both the District Court and this Court found was the result of a common course of conduct amounting to conspiracy among the same respondents, the following undisputed and uncontradicted evidence was adduced at the trial of the instant case.

Respondents admitted that it is the national policy of each to confine the exhibition of first-run feature films to the downtown areas of cities; that each has followed such a policy for many years, both before and after the *Paramount* litigation, and that such policy is applicable not only to Baltimore but throughout the United States.[46] They conceded that in rare situations exceptions to the national policy have been made but only in circumstances where a neighborhood theatre is owned by one of them or to avoid the obvious discrimination which would result from denial of such a run to independents in such circumstances.[47]

Respondents further admitted that each is aware that the other respondents are following the identical exclusionary policy.[48]

The uncontradicted evidence shows that five of the re-

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[46] R. 1a; 11a; 17a; 60a; 145a-146a; 164a-165a; 182a-183a; 213a; 218a; 233a-234a.

[47] R. 69a; 216a; 218a; 102a; 103a; 105a; 90a; 204a-205a.

[48] R. 150a; 66a; 192a.

spondents [49] own hundreds of theatres throughout the United States, many of which are first-run theatres and virtually all of which first-run theatres are located in the downtown section of cities; [50] that all of the respondents license their first-run pictures to theatres owned by the five distributor-exhibitor respondents and that substantial revenues are derived from such cross-licensing; and that all of the respondents know of the theatre ownership of these five respondents, as well as the cross-licensing and the substantial revenues thus derived. [51]

The uncontradicted evidence disclosed further that petitioner's Crest Theatre, seating sixteen hundred, built at a cost of $460,000, and located six miles from the nearest downtown theatre, is comparable in size, seating capacity, equipment and appointments to the downtown theatres in Baltimore which latter houses are granted first-run product. [52]

Respondents admitted that had the Crest been located downtown, or had it been owned by one of the respondents in its present location, it would have been afforded an opportunity to compete for first-run product. [53]

The evidence was also undisputed that petitioner was willing to pay, and had offered to pay by certified check film rentals equal to or greater than those actually received by respondents from their existing first-run accounts. [54]

Respondents admitted that their decision to deny petitioner an opportunity to compete for first-run film resulted from the application of their national policy to confine first-run showings to theatres located in downtown areas and had no necessary relationship to the particular cir-

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[49] Warner, Fox, Loew's, RKO, and Paramount.

[50] R. 126a-127a; 138a; 139a; 142a; 176a.

[51] R. 178a; 203a; 230a.

[52] R. 50a-53a; 22a; 26a; 64a.

[53] R. 145a-146a; 210a-211a; 219a; 166a-167a; 206a.

[54] R. 45a; 55a; 58a; 77a; 78a; 80a; 82a; 174a; 205a-206a.

cumstances of the Crest Theatre.[55] In fact this was affirmatively demonstrated by the fact that not a single top executive of any respondent ever saw the Crest prior to the uniform denial to it of first-run product.[56]

We submit that such evidence establishes the fact that respondents conspired illegally to deny petitioner an opportunity to compete for first-run product, and that petitioner was excluded from the first-run market for reasons wholly unrelated to the peculiar circumstances applicable to its local situation. Each respondent followed the same exclusionary policy in the knowledge that every other respondent was likewise following such policy. Each respondent knew that the common policy of all of confining the licensing of first-run film to downtown areas could not be maintained in the absence of common action by all of them. Each respondent followed a course of conduct over a period of years with the deliberate purpose and intent of excluding petitioner and others similarly situated from a substantial part of the market. This Court has held repeatedly that such a factual setting is sufficient to constitute a conspiracy to violate the Sherman Act. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226-227, *United States* v. *Masonite Corp.*, 316 U. S. 265, 275; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 723; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809-810; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 142.

The cases cited, when considered together, hold that evidence sufficient to establish a combination or conspiracy in violation of the Sherman Act exists when it is proved that members of an industry have participated in a particular course of conduct under circumstances which indicate that each must have known that the others would do or had done the same things, and the necessary result of their common, though separate, acts is to impose a restraint of trade

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[55] R. 1a; 11a; 60a; 145a-146a; 164a-165a; 182a-183a; 213a; 218a; 233a-234a.

[56] R. 50a.

of the character prohibited by the Sherman Act. These cases hold that the existence of conspiracy is even clearer where, as here, the course of conduct could not continue in the absence of participation by all of those involved, and the course of conduct, as it did here, produced results uniformly favorable to the participants and unfavorable to their competitors.

Proof of the type of circumstances existing here goes further than merely to establish an inference of conspiracy which respondents may rebut in the ordinary way. Where circumstances such as those herein admitted have existed this Court has held that conspiracy was established, even though the findings of the District Court that defendants had not entered into an agreement coterminous with the conspiracy alleged be accepted, and even in the face of explicit denials by each defendant either of the existence of an agreement or of any intention to combine with the others involved.[37]

In the instant case the undisputed evidence shows that respondents, who are in full control of the supply of pictures in the market in which petitioner desires to compete, have pursued a uniform course of conduct the necessary effect of which is to impose unreasonable restrictions upon commerce, each with an awareness that the others were also pursuing the same policy. Each knew that the exclusionary result could not be achieved except by the common action of all. It is submitted that such evidence clearly established a case of conspiracy as a matter of law under the cases last cited.

It is even clearer that petitioner established a case of conspiracy as a matter of law when the facts in the instant case are considered against the background and findings in the *Paramount* case. As previously pointed out this Court there held that these same respondents had conspired to impose unreasonable runs and clearances on a nationwide basis; that many clearances "had no relation to the competitive factors which alone could justify them;"

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[37] *United States* v. *Masonite Corp.*, 316 U. S. 265, 275-276.

that the clearances which were in vogue had "acquired a fixed and uniform character and were made applicable to situations without regard to special circumstances which are necessary to sustain them as reasonable restraints of trade." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 146. Since the undisputed evidence in this case shows that these same respondents were pursuing the same course of conduct which this Court in the *Paramount* case found was the result of conspiracy and which had been condemned as illegal, and since there was no factual conflict for the jury to resolve, the District Court should have directed a verdict for petitioner on the question of conspiracy. Under such circumstances the conduct here should have been equated with the conspiracy found in the *Paramount* case. There was no reason for permitting the jury to speculate as to whether or not there was conspiracy.

As against the undisputed and uncontradicted evidence of the existence of conspiracy the respondents advanced five so-called business reasons for uniformly denying petitioner an opportunity to compete for first-run film. These reasons were: (1) the existence of the national policy, followed by each, of confining first-run exhibitions to theatres located in downtown areas;[58] (2) the downtown showings draw larger crowds and hence bring in the largest revenues;[59] (3) the Crest could not be preferred to other similarly situated neighborhood houses, and if all neighborhood houses were granted access to first-run product the downtown theatres throughout the country, which were largely owned by respondents, would be eliminated;[60] (4) the downtown theatres have been satisfactory customers of long standing,[61] and (5) the Crest would not be successful and hence respondents would not experiment with it.[62]

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[58] R. 1a; 11a; 60a; 145a-146a; 164a-165a; 182a-183a; 213a; 218a; 233a-234a.

[59] R. 86a; 115a; 147a; 165a; 227a.

[60] R. 162a-163a; 230a.

[61] R. 144a; 148a.

[62] R. 147a; 150a; 230a.

These five so-called business reasons constituted the "evidence" relied upon by respondents to rebut petitioner's case in chief on the question of conspiracy. But evidence which shows merely that respondents had a common business purpose for excluding petitioner from the first-run market has no relevance to a showing that they did not conspire to do so. The logical inference would be to the contrary. Since admittedly there was exclusion of a competitor from the market the fact that there were business reasons which made such exclusion desirable to respondents affords no legal justification for such conduct. *United States* v. *Masonite Corp.*, 316 U. S. 265, 276 (1942).

These so-called business reasons were merely *excuses* which were offered to justify the maintenance of the jointly-pursued non-competitive national policy of confining first-run showings to downtown areas, rather than evidence to prove that there was no joint or common purpose to exclude petitioner from the first-run market. Three of the excuses, namely, the larger revenue from downtown operations, the necessity for protecting respondents' investment in their downtown theatres, and the satisfactory relationship with existing customers, do not constitute evidence rebutting the existence of conspiracy but are merely reasons for the adoption and maintenance of the conspiracy they are pleased to call a national policy.

The only excuse given which might possibly have pointed to independent competitive behavior was respondent's statement that the Crest would not be successful if operated as a first-run house. But since all of them refused to experiment with first-run film at the Crest, the question of whether it could in fact have been operated successfully on a first-run basis is purely conjectural. In addition, this particular reason for exclusion has no probative force since respondents would not have granted first-run to the Crest anyway because of the existence of their jointly-pursued national policy of confining first-run exhibitions to theatres located in downtown areas. The evidence did show that in the few situations in which respondents had licensed

neighborhood theatres on first-run such operations had been successful.[63] One respondent hinted that had it owned the Crest such theatre would probably have been granted first-run privileges.[64]

To advance the national policy as an excuse for denying petitioner access to first-run product is but to admit the fact of conspiracy since each pursued the same policy with knowledge that all the others were following the same policy, each knew that the exclusionary result could be achieved only by the common action of all, and each knew that common pursuit of such policy would impose an unreasonable restraint upon petitioner's theatre operation. Under the cases discussed (pages 36-37, *supra*) such conduct constitutes conspiracy.

Respondents' contention that downtown theatres draw larger crowds and bring in more revenue has no peculiar application to Baltimore. Indeed it was patently inapplicable to the particular situation here since petitioner had offered guarantees which were adequate to protect respondents.[65] If the drawing power of the downtown theatres proved so superior to that of the Crest that the latter could not continue to offer the required guarantees, then competition would effectively dispose of petitioner's bids for first-run pictures.

Doubtless respondents believed that their nationwide system of runs and clearances which were substantially uniform as to each local competitive area, and which had been unqualifiedly condemned by this Court in the *Paramount* case, were financially advantageous to them, but that fact supplied a motive for joint action rather than proof of its absence. It is interesting to note that William F. Rodgers, who for sixteen years had been the general sales manager for Loew's, testified that in Boston where a suburban house owned by Loew's was playing first-run day

[63] R. 161a; 185a; 204a-205a; 227a.

[64] R. 166a-167a.

[65] R. 45a; 55a; 58a; 59a; 77a; 80a; 82a; 174a; 205a-206a.

and date with a downtown house also owned by Loew's, it was "not uncommon for the theatre in the Back Bay section to outgross the theatre downtown." (R. 227a).[66]

Respondents' concern with the possible effect upon their nationwide theatre investment in downtown theatres if neighborhood houses were granted an opportunity to compete for first-run product is understandable. Such concern provides a strong motive for the nationwide exclusion of neighborhood theatres from first-run product but it offers no basis for an inference of local independent competitive activity in this case. Nor has it any bearing whatsoever upon petitioner's qualifications for first-run film in Baltimore, nor to the local competitive situation. Such common concern, however, does explain the unanimity with which respondents refused petitioner first-run product and the unanimity with which they granted petitioner first subsequent run. However, it is wholly irrelevant to a showing that each acted independently of the others.[67]

The excuse that the Crest was denied first-run product because the downtown theatres have been customers of long standing is no defense to proof of a nationwide conspiracy to adopt and maintain non-competitive runs and clearances. At best it merely confirms an established industry aversion to the stresses of competition. In denying the request of the minor defendants that they be permitted to retain their old customers regardless of discrimination, the District Court in the *Paramount* case said that "the system of preferring old customers undoubtedly aided discrimination in

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[66] Boston was one of the few cities in which respondents permitted a neighborhood house owned by one of them to play first-run film.

[67] While only Loew's and Warner owned downtown theatres in Baltimore, the three other majors, Fox, Paramount, and RKO, as well as Loew's and Warner, owned and operated first-run theatres and dominated the first-run market in the 92 largest cities of the nation, including Baltimore. Each of the five majors could expect, and in fact did receive, reciprocal favored treatment in those major cities in which such distributors owned theatres. (See 85 F. Supp. 881, 888, 893-895.)

the past and served as a ready excuse for a fixed system of runs and clearances and was to that extent unlawful."[48]

This is not a case in which the alleged conspirators offered evidence that they acted independently from some motive unrelated to restraint of trade. On the contrary, respondents not only knew that their common course of conduct would unreasonably restrain competition, but by their explicit admission, they deliberately intended to restrain the trade of independent neighborhood theatres. Their defense was merely that it was convenient and economically profitable to do so.

Nor did the excuses offered by respondents for denying first-run to the Crest have anything to do with the size, seating capacity, equipment, appointments, or policy of operation of that theatre. The excuses advanced were admittedly applicable across-the-board to all neighborhood theatres without regard "to the special circumstances which are necessary to sustain them as reasonable restraints of trade." *United States* v. *Paramount Pictures, Inc., et al*, 334 U. S. 131, 146.

It is firmly established that evidence showing a conspiracy to impose unreasonable restraints upon commercial competition cannot be refuted by evidence showing business necessity, good intentions, or economic motives. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 599 (1951); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 468 (1941); *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 220, 221 (1940); *Paramount Famous Lasky Corporation* v. *United States*, 282 U. S. 30, 43, 44 (1930); *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 613 (1914); *Standard Sanitary Manufacturing Company* v. *United States*, 226 U. S. 20, 49 (1912); *American*

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[48] 85 F. Supp. 881, 898. Petitioner's requested instruction No. 61 which was refused reads (R. 299a): The system of preferring old customers has been used by these defendants in the past as a ready excuse for a fixed system of runs and clearances and was to that extent unlawful.

Medical Association v. *United States*, 120 F. 2(d) 233, 249 (C. A. D. C. 1942) affd. 317 U. S. 519; *United States* v. *General Motors Corporation, et al.*, 121 F 2(d) 376, 406, 407 (C. A. 7, 1941), cert. den. 314 U. S. 618. The question for determination here was not *why* respondents excluded petitioner from the first-run market but whether the *admitted exclusion* was the *result* of *conspiracy*. The business reasons offered by respondents in defense of their action were beyond the scope of such inquiry.

The real reason for respondents concerted refusal to offer petitioner an opportunity to compete for first-run product lies in their desire to retain monopoly control of first-run exhibitions.[*] As this Court said in the *Paramount* case "the main contest is over the cream of the exhibition business—that of the first-run theatres;" that the central problem was "which exhibitors get the highly profitable first-run business;" that "the controversy over monopoly relates to monopoly in the first-run phase of the exhibition business." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166-167. As a means of breaking respondents' strangle-hold on the first-run exhibition business this Court approved the action of the District Court in enjoining the fixed system of runs and clearances which had been imposed without regard to local situations and decreed the divorcement of exhibition from distribution in order to end the conspiracy.[**]

Despite these judgments against them respondents have resisted every effort to break their monopoly of the first-run exhibition field. When a new method of competition developed in the form of the drive-in theatre these same

[*] These same respondents have concertedly denied first-run product to independent theatres located in downtown areas where such independent theatres were comparable in size and appointments to downtown theatres owned by respondents. (*See Williams Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2(d) 738 (C. A. 3, 1945), cert. den. 334 U. S. 811 (1948); *Ball* v. *Paramount Pictures*, 169 F. 2(d) 317 (C. A. 3, 1948), cert. den. 339 U. S. 911 (1950).

[**] 334 U. S. 131, 146-147, 174-176.

respondents uniformly relegated such theatres to subsequent-run status without regard to local circumstances. In the *Milgram* case the distributors refused a drive-in theatre an opportunity to compete for first-run film despite the fact that the operator of such theatre had offered higher film rentals than was paid by the exhibitor-defendants.[71] These same respondents offered the identical "business reasons" as those offered here for denying first-run pictures to drive-ins but the Court of Appeals there held that such reasons "were not strictly relevant."[72] It held further that such reasons were not peculiarly applicable to plaintiff's drive-in theatre but, on the contrary, were applicable to all drive-in theatres,[73] and that denial of first-run film to the plaintiff was the result of a nationwide policy of all the distributors to relegate drive-ins to second-run status.[74]

Where, as here, another method of competition developed, namely, the de luxe suburban house, respondents again acted with unanimity in relegating it to second-run status. While this case arose from the demand of a single theatre owner and involves a local situation, the reasons for refusing such theatre first-run product are directed to the position occupied by neighborhood theatres in the motion picture field. The plain fact is that the Crest was denied an opportunity to compete for first-run product simply because it was a suburban theatre. This conclusion is buttressed by the admission of respondents that had the Crest been located in the downtown area it would have been afforded access to first-run film. In effect, respondents have erected a fence around the neighborhood theatre and relegated it to subsequent run status.

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[71] *Milgram* v. *Loew's, Inc., et al*, 94 F. Supp. 416, 418 (1950), affd. 192 F. 2(d) 579 (C. A. 3, 1951), cert. den. 343 U. S. 929 (1951).

[72] 192 F. 2(d) 579, 585.

[73] *Ibid.*, p. 583.

[74] *Ibid.*, p. 586.

Such a policy runs counter to the modern trend of locating both business houses and theatres in the suburban areas of large cities so as to avoid growing congestion in downtown areas. Suburban areas are themselves frequently cities within Metropolitan boundaries with their own business, shopping, and entertainment centers. They have developed because of the spreading growth of cities, the distance of suburban areas to downtown, and the complicated and expensive parking problems which are present in any large city. To deny neighborhood theatres an opportunity to compete for first-run product is but to stem the tide of progress and deny convenient entertainment outlets to patrons. This is especially true where, as here, the suburban theatre is of adequate size, properly managed, suitably equipped, located in a thriving community from which it can draw on a large population, and capable of charging the same admission prices as well as paying the same or potentially greater film rentals to the distributors as are paid by downtown houses.

Under our competitive system progress is achieved from "the constant development of new forms and methods and their entry into free competition with the old," and unless proved to be detrimental to the public they should "be allowed to find their proper place in the industry, rather than have a place assigned to them by a dominant group with monopolistic power." *Milgram* v. *Loew's, Inc., et al.*, 94 F. Supp. 416, 421 (1950), aff'd. 192 F 2(d) 579 (C. A. 3, 1951), cert. den. 343 U. S. 929 (1951).

It is apparent from the factual situations developed in the *Milgram* case as well as in the instant case that respondents are continuing their efforts to monopolize "the cream of the business," the lucrative first-run field, in the teeth of this Court's action in the *Paramount* case.

It is the position of the petitioner that the undisputed and uncontradicted evidence in this case, when viewed in the light most favorable to respondents, clearly established the existence of a conspiracy to foreclose petitioner and

other neighborhood theatres similarly situated from an opportunity to compete in the first-run film market; that the conspiracy was a continuance of the same conspiracy already condemned by this Court in the *Paramount* case, and that no relevant defense was offered to refute the clear case of conspiracy established largely through respondents' own admissions, and hence that the trial court erred in refusing to instruct a verdict for petitioner on the question of conspiracy.

II

The District Court Deprived Petitioner of the Benefits of Section 5 of the Clayton Act by Failing to Explain Adequately the Background, Scope and Significance of the Paramount Case and Its Impact Upon the Instant Case and by Instructing the Jury that Petitioner Still Had to Prove Conspiracy Because the Present Factual Situation Had Not Been Before the Court in the Paramount Case

Section 5 of the Clayton Act provides that judgments in Government Antitrust suits shall constitute prima facie proof of all matters which the defendants are estopped from relitigating with the Government. The admissibility of such judgments under Section 5 was conclusively established by this Court in *Emich* v. *General Motors Corporation*, 340 U. S. 558 (1951). It was there held that not only the final judgment but any other part of the primary record in the Government case necessary to determine the scope of the estoppel described in Section 5, should be received in evidence.[75] It was held further that the trial court should then instruct the jury with respect to the significance which should be given the judgment in the Government suit in weighing the charges of illegal conduct.[76] This Court held also that, although the private litigant is required to establish the injury to his business by independent evidence, he is entitled to rely upon the estoppel created by the judgment in the Government suit to establish the prima

[75] At pp. 571-572.

[76] At p. 572.

facie illegality of the conduct by which he has been injured as well as the injurious purpose of such conduct."[77]

This Court has determined that the theory of Section 5 is that Congress, recognizing that the prosecution of an antitrust suit involves numerous complex burdens which might discourage private suitors from availing themselves of the remedy afforded by Section 4 of the Clayton Act, intended to integrate public and private enforcement of the antitrust laws by permitting judgments in Government suits to be used in private suits as prima facie proof of the charge of illegal conduct, leaving to the private suitor the burden of a prima facie showing that such illegal conduct actually injured him."[78]

It is submitted that the trial Court's charge with respect to the purpose, scope and effect of the *Paramount* litigation was so superficial and so limited as to deprive petitioner of any of the benefits conferred upon it by Section 5 of the Clayton Act. Although he had before him all four final decrees entered in that litigation, and had had his attention called to the reported opinions, findings of fact, and conclusions of law from which such decrees were derived, and also had had the benefit of two full arguments relating to the admissibility of the decrees (SR. 174-222; 914-952), the trial Court refused all of petitioner's requested instructions.

The Court told the jury that he had allowed the decrees in the *Paramount* suit to be introduced in evidence; that that suit was one brought by the Government against these same defendants at a time prior to the opening of the Crest and had held that these defendants had violated the antitrust laws by "restricting to themselves first-run and in establishing certain clearances in numerous places throughout the United States;" that such facts become prima facie evidence which plaintiff may use to support its claim that what the defendants have done since in Baltimore is within

[77] At pp. 570-571.

[78] At pp. 567-568.

the prohibition of the earlier decrees; that the present factual situation in Baltimore was not before the Court in the prior case and hence it was still necessary to plaintiff's recovery that it prove that the defendants conspired unreasonably to deprive plaintiff of first-run films, or to restrict plaintiff to unreasonable clearances. (R. 273a).

The Court of Appeals found "nothing detrimental to the plaintiff in these instructions." It held that the district court had correctly instructed the jury that the decrees were prima facie but not conclusive evidence of the conspiracy on which plaintiff's case was based, and that such an instruction was in accordance with the terms of Section 5 of the Clayton Act. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp., et al*, 201 F. 2(d) 306, 315-316.[79]

Contrary to the clear guide laid down by this Court in the *Emich* case[80] the trial Court: (1) failed to examine the record in the *Paramount* case for the purpose of determining the issues decided by those judgments, (2) failed to reconstruct that case in the manner and to the extent necessary to acquaint the jury fully with the issues therein determined, and (3) failed to explain the scope and effect of the *Paramount* judgments on the instant case.

Although petitioner offered the relevant documents in the *Paramount* case at the beginning of the trial (SR. 220-

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[79] Petitioner had not contended that the *Paramount* decrees were conclusive but sought only a full and clear charge which was necessary to permit the facts in the instant case to fall into proper perspective.

[80] This Court there said (340 U. S. 558, 572):

"In summary the trial judge should (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial. The Court may, in the interest of clarity, so inform the jury at the time the judgment in the prior action is offered in evidence; or he may so instruct at a later time if, in his discretion, the ends of justice will be served."

222), and reoffered them at the close of its case in Chief (SR. 482), as well as at the close of all of the evidence, the Trial Court refused their admission until a moment before he charged the jury on the entire case, at which time it was obviously too late for their proper consideration by the jury. (SR. 1002-1004).

Had the trial Court given even cursory attention to the *Paramount* judgments and to the comprehensive findings of fact and conclusions of law upon which they were based, it would have seen that the distributor defendants there, who are respondents here, were estopped by such judgments from relitigating with the Government the following matters of law and fact which were relevant to the instant case:[81]

(1) That these respondents in 1945, had illegally conspired with each other and with their first-run licensees to establish a nationwide system of runs and clearances which were substantially uniform in each local competitive area, and which had the effect of protecting affiliated first-run exhibitors from competition by independent exhibitors, such as petitioner;[82]

(2) That these respondents in 1945, had illegally conspired to discriminate against independent exhibitors, such as petitioner, by granting special license privileges to theatres affiliated with them and with large theatre circuits;[83]

(3) That these respondents in 1945, had illegally conspired to discriminate against independent exhibitors, such as petitioner, by granting unreasonable clearances against theatres operated by such independents;[84]

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[81] 70 F. Supp. 53, 71-74; 85 F. Supp. 881, 883-884, 885, 897-898.
[82] Conclusion of Law No. 7, 70 F. Supp. 53, 71-72.
[83] Conclusion of Law No. 8(d), 70 F. Supp. 53, 72.
[84] Conclusion of Law No. 8(e), 70 F. Supp. 53, 72.

(4) That the illegal conspiracy and discrimination described above could be ended only by divorcing each respondent from the theatre circuits affiliated with it;[85]

(5) That each respondent was enjoined from agreeing with any other respondent or with any exhibitor or distributor to maintain a system of clearances; from granting any clearances between theatres not in substantial competition; from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license in excess of that which was reasonably necessary to protect the licensee in the run granted, and that whenever any clearance provision was attacked as illegal, the burden was placed on the distributor to sustain its legality;[86]

(6) That hence-forth respondents were required to negotiate run and clearance, theatre by theatre, solely upon the merits of the respective offers received for a particular run from competing theatres and without discrimination in favor of affiliated theatres, circuit theatres or others.[87]

(7) That the relief necessary to end the continuing conspiracy and discrimination was not granted until February 8, 1950.[88]

The above constituted the minimum requirements for instructions relating to the scope and effect of the *Paramount* judgments as those judgments bear on the instant case. They constituted the matters of law and fact relevant to

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[85] 85 F. Supp. 881, 895-896; Sec. IV of Final Decrees of February 8, 1950.

[86] Sec. II, Pars. 2, 3 and 4 of decrees entered February 8, 1950 (SR. 1003)

[87] Sec. II, Par. 8, of decrees entered February 8, 1950 (SR. 1004)

[88] SR. 1004.

this case respecting which respondents were estopped by the judgments from relitigating with the Government. These judgments, which the trial Court refused to explain, were prima facie evidence that the admitted refusals of respondents to permit petitioner an opportunity to negotiate competitively for first-run film in Baltimore were, as charged, the product of a nationwide conspiracy to protect respondents' existing first-run licensees from independent competition. Failure to give the jury the benefit of such instructions constituted prejudicial error of the clearest kind. The sketchy instructions which were given did not afford the jury any opportunity to evaluate the evidence relating to the local situation in Baltimore against the background of the Government's lengthy litigation with these same respondents.

While it is true that such evidence is subject to refutation by respondents, and that any conflicts resulting therefrom were for the jury to resolve as to factual matters, and for the Court as to issues of law, the Court's failure to explain such matters in his charge left the jury in ignorance as to their relevance and importance. As a result petitioner was deprived of the benefits which Section 5 was intended to confer upon him.

While this Court in the *Emich* case properly left to the discretion of the trial court the exact manner in which the explanation of the prior judgment should be made,[89] it did 'set up clear guides [90] which were ignored by the trial Court here. The practical effect of the exceedingly narrow construction given was to nullify the evidentiary effect of Section 5 as far as petitioner's case was concerned. We submit that the instruction given by the trial Court frustrates the purpose of Congress in enacting Section 5 as a means of minimizing the burdens which would otherwise have to be borne by private suitors. The instruction given

[89] 340 U. S. 558, 571.
[90] 340 U. S. 558, 572.

also failed to follow this Court's construction of the use to be made of Section 5 as announced in the *Emich* case.

By instructing the jury that, despite the prior Government litigation it was still necessary, if petitioner was to recover, to prove that respondents conspired unreasonably to deprive petitioner of first-run product because the Baltimore factual situation was not before the Court in the *Paramount* case, the trial Court, in substance if not in form, required petitioner to retry the issue of conspiracy previously resolved against respondents.[91]

Baltimore was in fact referred to in the Government's amended complaint. In addition, exhibits were received in evidence in that case showing the first-run distribution of respondent's films in the 92 cities of the country with populations over 100,000 *including* Baltimore.[92] In any event the Government was not required to prove all the factual situations that might arise in any given locality in order to prove a nationwide conspiracy. *United States* v. *General Motors Corporation, et al*, 121 F 2(d) 376, 405 (C. A. 7, 1941) cert. den. 314 U. S. 618; *De Luxe Theatre Corp.* v. *Balaban & Katz Corp., et al*, 95 F. Supp. 983, 986; *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 299, 305, 307 (1953). To establish a prima facie case under the ruling in the *Emich* case[93] it was only necessary for

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[91] The Court of Appeals held that the *Paramount* decrees had no relation to the Crest Theatre since it was constructed after the decrees were entered, but said they were offered to show that defendants had entered into a prior conspiracy which was given effect when plaintiff applied for first-run privileges. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp., et al*, 201 F. 2(d) 306, 315.

[92] Exhibits Nos. 428 and 428a, *United States* v. *Paramount Pictures, Inc., et al.*, 66 Fed. Supp. 323, 70 F. Supp. 53, 334 U. S. 131.

[93] There the private suitor introduced the criminal judgments in the prior Government suit to show prima facie evidence of the existence of a nationwide conspiracy on the part of the General Motors group to monopolize the time sale financing of cars sold by General Motors dealers, and, in addition, introduced evidence of the cancellation of his dealership because of his refusal to use

petitioner to introduce the judgments in the prior Government case and such additional evidence as would show the impact of the conspiracy on petitioner.[94] This the petitioner did.

The instruction requiring *de novo* proof as to the existence of conspiracy in Baltimore may have resulted, in part, from the doubt expressed by the trial Court that petitioner could rely on the *Paramount* judgments since the original findings of fact in that case showed the situation as of 1945 (SR. 200-203) whereas petitioner didn't request first-run until January 1948. (R. 10a).

The mere fact that the findings in the *Paramount* case showed the situation generally as of 1945, whereas petitioner made its first request for first-run product in January 1948, in no way deprives petitioner of the right to rely upon the decrees eventually entered in that case as prima

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the financing facilities of a finance company affiliated with General Motors in the time-sale financing of cars sold by him at retail. This Court held such to be sufficient to prove a prima facie case for the plaintiff. (340 U. S. 558)

[94] In the only case other than the instant case in which a Court of Appeals has ruled directly upon the admissibility of the judgment in the *Paramount* case, the plaintiff alleged it had been driven out of business as a result of the earlier conspiracy proved by the Government in the *Paramount* case. Evidence had been introduced showing that the defendants had employed practices in plaintiff's locality and in treating with plaintiff similar to those practices which had been found in the *Paramount* case to have been used to further the nationwide conspiracy. The trial Court summarized the findings of fact in the *Paramount* case, and charged that if any of the practices found there "have been proved by plaintiff to have occurred with respect to the Brookside Theatre, you have the right to conclude without further proof on the part of the plaintiff that such acts or things were done by defendants pursuant to their conspiracy or illegal business practices in violation of the Sherman [illegible] described and established in the *Paramount* case." *Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp.*, Transcript of Record, pp. 2609-2610. Judgment for plaintiff was affirmed. *Twentieth Century Fox Film Corp. v. Brookside Theatre Corp.*, 194 F. 2(d) 846 (C. A. 8, 1952). The defendants' petition for certiorari, a main ground of which was the ruling regarding the admissibility of the judgments, was denied. (343 U. S. 942)

facie evidence of conspiracy here. The damage period in this case was from Fbruary 1949 to March 1950. (R. 260a). Final decrees were not entered against Loew's, Fox, Warner, Universal, Columbia and United Artists until February 8, 1950, more than two years after petitioner's original request which was made in January 1948 (R. 1001). Consent judgments after remand were entered against RKO on November 8, 1948, and against Paramount on March 3, 1949.[**] Since there was no evidence of abandonment the law presumes that the conspiracy continued until the entry of the final judgment which enjoined the condemned conduct. *Hyde* v. *United States*, 225 U. S. 347, 368, 370 (1912); *United States* v. *Perlstein*, 126 F. 2(d) 789, 798 (1941), cert. den. 316 U. S. 678. There is no presumption, however, that upon entry of judgment in a Government antitrust suit the defendants ceased their unlawful conduct. In the absence of clear proof to the contrary, abandonment of an unlawful conspiracy in violation of the Sherman Act

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[**] The following is the chronology of the *Paramount* litigation. The case went to trial in November 1945. The first decision by the Statutory Court was made on July 26, 1946 (66 F. Supp. 323). The judgment on this decision was entered on December 31, 1946, and the supporting findings are reported in 70 F. Supp. 53. In May, 1948, this Court affirmed the findings relating to liability, vacated the provisions of the decree which were inconsistent with the theatre divestiture sought by the Government, and remanded the case for further consideration of such relief (334 U. S. 131). In July, 1949, the Statutory Court held the Government was entitled to theatre divestiture against the five theatre-owning defendants in order to end the conspiracy (85 F. Supp. 881, 893-894, 895-898). New findings were entered on February 2, 1950 (85 F. Supp. 881, 888-889), and on the same day two judgments in accordance with such findings were entered, one against Fox, Loew, and Warner, theatre-owning defendants, the other against Columbia, Universal, and United Artists, non-theatre-owning defendants. The judgment against Loew, Fox and Warner was appealed and such judgment affirmed per curiam on June 5, 1950 (339 U. S. 974). The consent judgment against RKO, dated November 8, 1948, after remand from this Court, was entered without the taking of additional testimony. A similar judgment against Paramount was entered on March 3, 1949, after the taking of additional evidence on remand.

will not be presumed even after entry of judgment. *Local 167* v. *United States*, 291 U. S. 293, 297-298 (1934). This is particularly true where, as here, respondents had settled into a continuing pattern of antitrust violations. *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1951).[96]

The attitude of the trial court with respect to the *Paramount* case and the construction to be given Section 5 are illustrated by his remarks during argument of counsel on the admissibility of the decrees. He characterized the clear and unambiguous language of Section 5 as "clumsy," "inadequate," and "inartistic" (SR. 942); "that it confused the issue by bringing in a lot of subtle language which does not make sense when applied to a concrete situation" and that it would merely "befuddle the jury." (SR. 1000). While admitting that Section 5 required him to permit petitioner to call the jury's attention to the *Paramount* decrees and to explain that they were prima facie evidence of conspiracy, the Court said "it does not amount to anything, it has no force, no probative value unless they (the jury) find a concert of action;" that whether the decree was admissible for any purpose is "a close case;" that "it may be a twilight zone case." (R. 236a). Although his attention was called to this Court's instructions in the *Emich* case requiring that a trial judge, in dealing with the effect of judgments obtained by the Government in antitrust suits should "examine the record of the antecedent case to determine the issues decided by the judgment,"[97] the trial judge said, "That was a pretty big order, wasn't it?" SR. 219). Subsequently, in commenting on the same requirement, he said, "Well, I am not disposed to examine the record anymore than I have done from the papers that have been given me and the copies of the de-

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[96] This Court in the *Paramount* case had recognized the past proclivity of these respondents to unlawful conduct. 334 U. S. 131, 147.

[97] 340 U. S. 558, 572.

cree." (SR. 917). Although he admitted to having read this Court's opinion in the *Paramount case* (SR. 177) there is no indication that he read either of the two Statutory Court decisions or the findings of fact and conclusions of law upon which the final decrees were based.

After remarking that "Congress apparently did not know the hornet's next they were getting into" in passing Section 5, the Court then said that the mere fact that petitioner had a right to use the decrees in the prior Government suit as prima facie evidence of illegal conduct did not mean that petitioner could thereby "cast the whole burden on the defendants of showing that clearances in this particular case are valid" and that to so interpret Section 5 would be "absurd" (SR. 997). Such a construction misconceives the purpose of Section 5. The decrees in the prior Government suit are to be treated only as prima facie evidence of the existence of illegal conduct. Admittedly such presumption is rebuttable by proper evidence.

The trial Court's misconstruction of the purpose of Section 5, as well as his failure to grasp the full scope and effect of the *Paramount* case, manifested itself in other ways in his charge. Illustrative is his instruction relating to burden of proof with respect to establishing the reasonableness of clearances imposed upon the Crest. The decrees in the *Paramount* case provide that whenever any clearance provision is attacked as illegal the burden of proof is upon the distributor to sustain its legality (SR. 1003). The decrees require that each respondent individually must assume such burden of proof. They do not require evidence of conspiracy between two or more distributors before such burdens attaches. Nonetheless the Court instructed the jury that the burden shifts to respondents to prove legality of clearance *only* if the jury finds that petitioner has proved a conspiracy. (R. 273a-274a)

The most striking example of the trial Court's failure to grasp the purpose, scope and effect of the *Paramount* judg-

ments was his instruction, over objection, that Loew and Warner, both of which own and operate first-run houses in downtown Baltimore, had the absolute legal right to place their own pictures in their own theatres, on any terms they saw fit. (R. 271a) This unqualified statement is clearly erroneous.

Petitioner, in accordance with the provisions of the *Paramount* decrees which prohibited the granting of any clearance between theatres not in substantial competition (SR. 1003), had sought an instruction to the effect that if the jury found that the Crest was not in substantial competition with the Loew and Warner downtown houses, then clearance between those theatres and Crest would be improper (R. 302a-303a).

Refusal of this request left the jury uninformed on the whole problem of day and date first-run exhibition, a crucial issue in the case. In addition, the instruction given was erroneous because it ignored completely the factual situation at the time of trial. Loew and Warner had been found guilty of conspiring with others to violate the anti-trust laws in the prior Government litigation. To terminate such illegality this Court required that the five theatre-owning distributors, which included Loew and Paramount, divest themselves of their theatre-owning affiliates as a step toward eliminating discriminations against independent exhibitors.[**] In this setting the Court's instruction is contrary to the well-established principle that unrestricted freedom to select customers for self-sufficient reasons loses its protection when the choice is made in concert with others. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312; *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 572-574; *United States* v. *Pacific & A. R. & N. Co.*, 228 U. S. 87.

In support of the Court's charge respondents cite (Br. in Opp. p. 11) the provisions of Paragraph 5 of the decrees

[**] 334 U. S. 131, 166-177. On remand the Statutory Court ordered divestiture. 85 F. Supp. 881, 895-896.

entered in the *Paramount* case against Loew and Warner which suspend for the period allowed for theatre divestiture the anti-discrimination provisions relating to runs and clearances and permit these two companies during such period to license pictures in their own theatres, in such manner, and upon such terms and conditions as may be satisfactory to them.[99] But the suspension of the anti-discrimination provisions merely gives respondents immunity from contempt action by the Government during the period allowed for theatre-divestiture. It does not relieve them from liability to a private suitor who was injured prior to the effective date of the suspension. The damage period here was February 1949 to March 1950. (R. 260a). The final decrees were entered on February 8, 1950.

In instructing the jury that Loew and Warner had the legal right to show their own pictures in their own theatres exclusively, as and when they saw fit, the Court analogized the situation to a person selling his own homegrown farm products in his own grocery store (R. 267a). The weakness of any such analogy lies in the fact that respondents produce the desirable feature pictures on which operators of first-run theatres throughout the United States are dependent if they are to remain in business. *White Bear Theatres Corp.* v. *State Theatre Corp.*, 129 F. 2(d) 600, 603 (C. A. 8, 1942); *William Goldman Theatres, Inc.* v. *Loew's, et al*, 150 F. 2(d) 738, 741 (C. A. 3, 1945). The operations of a single farmer can hardly be compared to the effect of restrictions imposed by a group of the most powerful concerns in the nation.

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[99] This paragraph, read into the record by petitioner at respondents' request, provided that (SR. 1003): "Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way provide for, the exhibition of any or all of the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries."

One further point should be noted in connection with the trial Court's handling of the *Paramount* judgments. Although they were offered at the opening of the trial (SR. 220-222), and again at the close of petitioner's case in chief (SR 482), they were not admitted until all the evidence on both sides was in and the Court was ready to charge the jury (SR. 1002-1004).

If the decrees were to serve as prima facie evidence of conspiracy or of anything else, petitioner was entitled to have them before the jury as a part of its case in chief. If the decrees were admissible at all they were admissible as part of petitioner's prima facie showing of liability. The whole cast and character of the case at trial depended upon getting the decrees into evidence at the earliest possible time. By permitting petitioner to read into the record four paragraphs from the decrees only a brief moment before the Court delivered his charge to the jury on the entire case, no opportunity was afforded the jury to evaluate the evidence relating to the local situation in Baltimore against the background of the Government's lengthy litigation with these same respondents.

The prejudicial situation created by the wholly inadequate and erroneous instructions given by the Court, purporting to explain what the decrees meant as well as their relevance in the instant case, was compounded by the last minute acceptance of the decrees. It strains credulity to believe that, under such circumstances, the jury could possibly have grasped the significance of the prior Government case insofar as it bore on the issues of the case submitted to it for decision.

In the Court below as well as in their Brief in Opposition to the Petition for Certiorari (p. 9), respondents insisted that petitioner made no objection to the Court's proposed charge relating to the *Paramount* case. The record itself is sufficient answer. In accordance with this Court's construction of Section 5, petitioner submitted sixteen proposed instructions relating to the scope and purpose of the

Paramount judgments, and their effect upon the factual situation present in the instant case. (See pages 20 to 22, *supra*). These instructions were designed to give petitioner the benefits arising from the prior Government litigation as contemplated by Section 5. They dealt particularly with problems of runs and clearances which were the instruments employed by respondents to deprive petitioner of an opportunity to compete for first-run product.

All of these proposed instructions were refused (R. 277a, 280a-282a). Both Court and counsel had spent an entire afternoon in consideration of instructions proposed by both sides. After the charge to the jury both sides sought additional instructions. Petitioner renewed its request for instructions on the *Paramount* case which was refused (R. 282a). These proposed instructions were read into the record. (SR. 1114-1117). The trial Court's annoyance with petitioner's insistence upon proper instructions is exemplified in the comment that "We have been over all this. Everything in the charge was discussed almost into the night, *ad nauseum*, almost I think you might say." (R. 280a).

CONCLUSION

We submit that since the admitted and undisputed facts constituted a violation of the Sherman Act as a matter of law, and since the instructions to the jury with respect to the Government's prior litigation in the *Paramount* case were insufficient to afford petitioner the benefits of that litigation as provided by this Court's construction of Section 5 of the Clayton Act, the judgment below should be reversed.

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APPENDIX

Clayton Act

Section 4 (38 Stat. 731, 15 U. S. C. 15) *(Treble damage Suits)*

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 5 (38 Stat. 731, 15 U. S. C. 16) *(Judgments in Favor of Government Prima Facie Evidence)*

That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Section 16 (38 Stat. 737, 15 U. S. C. 26) *(Suit for Injunction by Party Damaged)*

That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions

and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

Sherman Act

Section 1 (26 Stat. 209, 15 U. S. C. 1) *(Contract, Combination or Conspiracy in Restraint of Interstate Commerce Illegal)*

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

Section 2 (26 Stat. 209, 15 U. S. C. 2) *(To Monopolize, Attempt to Monopolize, Combine or Conspire)*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.